IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2007 Session

JOSEPH AMOS, JR., ET AL. v. CHRISTINA TAYLOR, ET AL.

Appeal from the Chancery Court for Williamson County
No. 26760 Russ Heldman, Chancellor

No. M2006-02170-COA-R3-CV - Filed April 28, 2008

The matters at issue arise out of an action filed by four co-tenants against numerous other co-tenants to quiet title to the real property pursuant to doctrine of title by prescription. The trial court granted the plaintiffs' motion for summary judgment, thereby quieting title in the plaintiffs. The defendants appeal contending the trial court erred by granting the plaintiffs' motion due to the undisputed fact that some of the co-tenants were under the disability of minority during the period of prescription. The parties to this action acquired title to the property as heirs-at-law following three generations of intestacy. The plaintiffs' claim is based upon the exclusive possession and occupancy of the property by their father, Pete Amos, who had exclusive use, possession and occupancy of the property for a period of twenty-one years, 1958 through 1979. When Pete Amos died in 1979, his wife and children acquired his interest in the property by intestacy, thereby becoming tenants in common along with the various other co-tenants; however, they did not actively farm the property or continuously occupy the property thereafter, as Pete Amos had done for the previous twenty-one years. Thus, the prescriptive period at issue is from 1958 to 1979. The plaintiffs, who are children of Pete Amos, filed this action to quiet title to the property to the exclusion of the other co-tenants, based upon the prescriptive period of 1958 to 1979. The record reveals, and it is undisputed, that one or more of the co-tenants between 1958 and 1979 were under the disability of minority. An essential element of a claim based upon the doctrine of title by prescription requires affirmative proof that none of the co-tenants were under a disability during the prescriptive period of twenty years. We therefore vacate the trial court's order granting the plaintiffs' motion for summary judgment and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and E. RILEY ANDERSON, SP. J., joined.

Leroy Johnston Ellis, IV, Nashville, Tennessee, for the appellants, Larry T. Hunter, Thomas Edward Winstead, Sr., and James Walter Winstead, Individually and as Representative Trustees.

Douglas Berry, Nashville, Tennessee, for the appellees, Joseph Amos, Jr., Johnie Mae Pope, Charlie R. Amos, and Gladys Carter.

OPINION

Joseph Amos, Jr., Johnnie Mae Pope, Charlie R. Amos, and Gladys Carter (hereinafter "Plaintiffs"), co-tenants of the property at issue, filed this action in 2000, to establish title to an eighteen-acre parcel of real property in Williamson County. The defendants included twenty-one co-tenants along with potentially unknown co-tenants. The plaintiffs' claim of prescriptive title was based in principal part upon the alleged exclusive possession and use of the property by the plaintiffs' father, Joseph "Pete" Amos, from 1958 to 1979.

Pete Amos acquired an undivided interest as a tenant in common along with numerous other relatives in 1958, when his aunt, Mary Lou Locklayer, a widow, died intestate without issue. Mrs. Locklayer, the sole owner of the property at issue at the time of her death in 1958, had five siblings, Johnnie Amos, Lucy Scruggs, Cora Winstead, George Calhoun, Jr., and Laura Scruggs; however, all of her siblings predeceased her. Because she died without a will and had no spouse or issue, title to the property descended by intestate succession to the issue of her five deceased siblings, one of whom was the plaintiffs' father, Pete Amos.[1]

When Mrs. Locklayer died, there was a very modest residence on the property, which at that time was situated in a rural farming community. The house did not have heat, electricity, or indoor plumbing at the time. In spite of the primitive conditions then existing, one of the new joint tenants, Pete Amos, chose to move onto the property with his wife, Alberta Amos, and four children. From 1958 until his death in 1979, Pete Amos worked the entire property as a modest farming operation, growing tobacco and raising livestock.[2] During that period, Pete Amos also collected all of the income from his farming operation and did not share the profits with any co-tenants.

Throughout the twenty-one years Pete Amos occupied the property, he and his wife made numerous improvements to the residence on the property. Notably, they installed indoor plumbing and added a bedroom and bathroom. They also maintained and made all of the necessary repairs to the residence and the eighteen-acre farm. Moreover, during the twenty-one year period at issue, Pete Amos and his wife were the only ones to spend any money to maintain the property, and they never asked for, nor received, any financial assistance from another co-tenant. They also paid the property taxes throughout the period at issue without contribution from another co-tenant.

Pete Amos died intestate in 1979, and was survived by his wife, Alberta Amos, and his four children, the plaintiffs. As a result of his death, his interest in the property passed by intestacy to his wife and children as tenants in common.

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[1] Ms. Johnnie Amos, a deceased sister of Mary Lou Locklayer, was the mother of Pete Amos.

[2] Pete Amos also acquired a parcel of property adjacent to the property at issue and farmed the combined acreage.

Following her husband's death, Alberta Amos, along with some of the children, continued to reside in the house and occupy the property until shortly before her death in 1987. They, however, did not actively farm the property after 1987, as Pete Amos had done for the previous twenty-one years.

After the death of Alberta Amos in 1987, Jan Hammer, a daughter of one of the plaintiffs, resided there until 1993. Although no one has resided in the residence since 1993, the plaintiffs, Joseph Amos, Jr., Johnnie Mae Pope, Charlie R. Amos, and Gladys Carter, have "rented out" the tobacco base on the property, retained all of the income, maintained the house and some of the property, and paid the property taxes. Furthermore, none of the defendant co-tenants or their predecessors in interest have provided any financial assistance to the plaintiffs or their predecessors in interest. The plaintiffs, however, have not conducted any significant agricultural operations on the property since Pete Amos's death in 1979.

In January 2000, the plaintiffs filed this action against the numerous co-tenants – all of whom are heirs of the plaintiffs' great-aunt, Mary Lou Locklayer – claiming title to the property by prescription during the time their father worked the property. The defendants include twenty-one known co-tenants of the property and other unknown co-tenants whom the plaintiffs believe may have an interest in the property.[3] In the Complaint, the plaintiffs claim their late father, Pete Amos, exercised uninterrupted possession, dominion, and control over the real property from December 1958 until his death in August 1979. They assert that their father claimed the property as his own and collected all the rents and profits without accounting to or claim by his co-tenants, and that he paid all taxes and indebtedness against the property. They also claim that he made substantial improvements to the property at his own expense without the contribution of the other co-tenants. Based upon these facts, which they assert are undisputed, the plaintiffs assert that they, along with their half brother, Herbert Hunter, who is not a plaintiff, are the only owners of the property.[4]

Answers were filed by several of the defendants, and some of them filed counterclaims seeking partition of the property or sale by partition. A few of the defendants relinquished any interest they might have in the property by executing quitclaim deeds in favor of the plaintiffs. As for the other defendants, those who did not file Answers or relinquish their interest in the property, the plaintiffs obtained default judgments against them.

The parties remaining in the litigation participated in discovery and subsequently agreed to set the case for trial. While the trial date was approaching, the plaintiffs filed a Motion for Summary Judgment with supporting affidavit and statement of facts and asked for the trial date to be continued. The court refused to continue the trial date but set the summary judgment hearing on the day of the trial with the intention of trying the case immediately afterwards should the summary judgment motion fail. On the hearing date, one of the defendants filed an amended response to the

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[3]The court ordered notice by publication to any unnamed or unknown heirs of Mary Lou Locklayer.

[4]The plaintiffs' half brother, Herbert Hunter, is the son of Alberta Amos, the widow of Pete Amos. Plaintiffs averred that they share an interest in four-fifths of the property, each plaintiff owning a seven-thirtieths undivided interest in the property, and that Herbert Hunter owned the remaining one-fiftieth interest.

plaintiffs' statement of facts, in which the defendant asserted that two of the co-tenants, Christine Taylor and Annie Frances Toran, were minors, and thus under the disability of minority when Pete Amos allegedly exercised dominion and control over the property. Due to this development, the hearing on the Motion for Summary Judgment and the trial were continued indefinitely.

Thereafter, the parties agreed to reset the motion for hearing. After conducting a hearing on the Motion for Summary Judgment, the Chancellor took the matters at issue under advisement. On August 31, 2006, the Chancellor issued an Order granting summary judgment to the plaintiffs on their claim of title by prescription and dismissing the remaining defendants' claims for partition. This appeal soon followed.

Defendants Larry T. Hunter, Thomas Edward Winstead, and James Walter Winstead, acting individually and as representative trustees for the other defendants, perfected this appeal. They contend the Chancellor erred in: (1) granting summary judgment on the issue of title by prescription; (2) finding no genuine issue of material fact; (3) awarding summary judgment despite the minor status of some of the co-tenants to be divested of the property; (4) awarding summary judgment despite that the co-tenant in possession, Pete Amos, never challenged the rights of the other co-tenants or claimed the property as his own; (5) awarding summary judgment despite that the co-tenant in possession had the consent of the other co-tenants to reside on the property; and (6) denying the defendants' request for partition of the property.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the

strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

"Title by prescription" is a mode of acquiring title to real property by "immemorial or long-continued enjoyment." *Zetrouer v. Zetrouer*, 89 Fla. 253, 256, 103 So. 625, 627 (Fla. 1925).[5] The term "prescription" derives from the term "prescribe," which in the non-medical sense means to "assert a right or title to the enjoyment of a thing, on the ground of having hitherto had the uninterrupted and immemorial enjoyment of it." *Black's Law Dictionary* 4th Ed. Rev. (1968), p.1345.

The original theory underlying the right of title by prescription was that "the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time in England went back to the time of Richard I."[6] *Zetrouer*, 103 So. at 627. Because proving "continued enjoyment" of the property back to the time of Richard I was becoming more problematic with the passage of time, a custom arose of "allowing a presumption of a grant" on proof of "usage for a long term of years." *Id.*

The doctrine of title by prescription in Tennessee can be traced to the 1860 case of *Marr's Heirs v. Gilliam*, 41 Tenn. 488 (Tenn. 1860). In that matter the Tennessee Supreme Court stated:

> It is . . . well settled that the exclusive and uninterrupted possession by one tenant in common of land for a great number of years – say for twenty or more – claiming the same as his own, without any account with his co-tenants, or claim on their part, – they being under no disability to assert their rights, – becomes evidence of a title to such sole possession, and the [fact finder is] authorized to presume a release, an ouster, or other thing necessary to protect the possessor . . . .

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[5] It is important to recognize at the outset that the plaintiffs' claim of title is not based on the doctrine of adverse possession. The doctrine of title by prescription is often confused with the doctrine of adverse possession; however, the two doctrines are different in several important respects. *See Hallmark v. Tidwell,* 849 S.W.2d 787, 792 (Tenn. Ct. App. 1992) (stating that its discussion of authorities on the doctrine of prescriptive title was included to distinguish it from the doctrine of adverse possession); *see also Walker v. Moore*, 745 S.W.2d 292, 297 (Tenn. Ct. App. 1987) (stating the requirements for prescriptive title are not identical with those of statutory adverse possession).

[6] According to one treatise, title by either possession or prescription are old subjects in the English Law with counterparts in the Roman Law. *Cumulus Broad., Inc. v. Shim*, 226 S.W.3d 366, 375 (Tenn. 2007) (citing Boyer, *Survey of the Law of Property* 764; *see Taylor ex dem. Atkyns v. Hord*, 1 Burr. 60, 97 Eng. Rep. 190 (K.B.1757); *see also Freeman v. Martin Robowash, Inc.*, 457 S.W.2d 606, 609-10 (Tenn. Ct. App. 1970)).

Marr's Heirs, 41 Tenn. at 501. As the Court of Appeals explained 110 years later, possession of land is prima-facie evidence of title and "the law supposes that it had a legal origin." *Morgan v. Dillard*, 456 S.W.2d 359, 362 (Tenn. Ct. App. 1970). In Tennessee, such possession must remain "undisturbed for the period of twenty years," and if it does, the undisturbed possession becomes "an assurance of title of no less force or efficacy than the actual grant whose place it supplies." *Id.*

If a plaintiff can prove the requisite "long-continued use and enjoyment" of the property, a *presumption* of title by prescription arises. *Morgan v. Dillard*, 456 S.W.2d 359, 362 (Tenn. Ct. App. 1970) (citing *Cannon v. Phillips*, 34 Tenn. 211, 214 (1854)) (emphasis added); *Brown v. Daly*, 83 S.W.3d 153, 159 (Tenn. Ct. App. 2001) (quoting *Livesay v. Keaton*, 611 S.W.2d 581, 583 (Tenn. Ct. App. 1980) (holding that if the party asserting title has proven both essential elements, "a presumption of title may arise in favor of the possessor of the land"). The "presumption" of title rests upon the simple fact of long-continued use and enjoyment. *Morgan*, 456 S.W.2d at 362. The presumption that results from the long-continued possession and use is not founded upon the idea that as a matter of fact a grant once existed, "it rests alone upon a principle of public policy, to quiet the title of those who can show no other title than long-continued possession and use." *Id.* (quoting *Cannon v. Phillips*, 34 Tenn. 211, 214 (Tenn. 1854)).

The presumption of title, however, may be rebutted by evidence that the possession was by the permission or indulgence of the other co-tenants. *Walker v. Moore*, 745 S.W.2d 292, 295 (Tenn. Ct. App. 1987); *Morgan*, 456 S.W.2d at 363. It may also be rebutted by the fact one or more of the co-tenants were under a disability, such as the disability of minority during the requisite twenty year period. *Walker*, 745 S.W.2d at 298. Moreover, "*disabilities may accumulate to rebut the presumption, which is unlike the statute of limitations* (the doctrine of adverse possession)." *Id.* (citing *Marr's Heirs v. Gilliam*, 41 Tenn. 488 (Tenn. 1860); *Hubbard v. Wood*, 1 Sneed 279 (Tenn. 1853); *McClung v. Ross*, 18 U.S. 116 (U.S. 1820); *McCorry v. King*, 22 Tenn. 267 (Tenn. 1842); *Brock v. Burchett*, 32 Tenn. 27 (Tenn. 1852) (emphasis added)).

To establish title by prescription between or among co-tenants, the parties asserting title must prove two elements. *Brown v. Daly*, 83 S.W.3d 153, 157 (Tenn. Ct. App. 2001); *Livesay*, 611 S.W.2d at 583; *Morgan*, 456 S.W.2d at 361.[7] First, the prescriptive holder must show exclusive and uninterrupted possession of the land in question for more than twenty years, during which time he must claim the same as his own without any accounting to his co-tenants or claim on their part. *Livesay*, 611 S.W.2d at 583 (citing *Morgan*, 456 S.W.2d at 361). Second, *the party asserting title must also show that none of the co-tenants were under a disability to assert their rights to the property*. *Id.* (emphasis added).[8] Both elements must be proven for the doctrine of title by prescription to apply. *Brown*, 83 S.W.3d at 157 (quoting *Livesay*, 611 S.W.2d at 583); *see State ex rel. Comm'r, Dep't of Transp. ex rel. Dep't of Transp. v. Patrick*, No. W2001-00397-COA-R3-CV,

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[7] See *Crowell v. Hasty*, No. 01A01-9609-CH-00431, 1998 WL 894721, at *5 (Tenn. Ct. App. Dec. 22, 1998, for a discussion regarding common law prescription between two non-co-tenant parties.

[8] Some Courts have merged the first and second elements of prescriptive title; however, we choose to follow the way in which the Court describes the elements in *State ex rel. Comm'r, Dep't of Transp. ex rel. Dep't of Transp. v. Patrick*, No. W2001-00397-COA-R3-CV, 2001 WL 1683751 at *3 (Tenn. Ct. App. Dec. 27, 2001).

2001 WL 1683751 at *3 (Tenn. Ct. App. Dec. 27, 2001). If one of the elements is not proven, then the doctrine is not applicable to the case. *Livesay*, 611 S.W.2d at 584.

The significance of proving each element was the focus of the court's analysis in *Livesay v. Keaton.* The only claim of title in *Livesay* was based on the following assertion in the complaint:

> The plaintiff would show to the Court that he has made every mortgage payment on said property, has paid every tax bill on said property for the last forty-one years, and has held and possessed such property openly, notoriously, continuously, and adversely during such time.

Id. at 583. The Court of Appeals found the foregoing assertion deficient, as a matter of law, because the plaintiff failed to prove that none of the co-tenants were under a disability during the prescriptive period. *Id.* As the court explained it, the party asserting title "did not prove that his co-tenants were 'under no disability to assert their rights' during the period that the plaintiff held the property." *Id.* Because the plaintiff failed to establish that none of the co-tenants were under a disability, the Court of Appeals affirmed the summary dismissal of the complaint.

Recognizing the necessity of proving each element, we will first focus on the issue of whether the plaintiffs' claim is defeated due to the fact some of the co-tenants were under the disability of minority during the prescriptive period, that being the period from 1958 to 1979, during which time Pete Amos continuously used and possessed the property.

In the present matter, the plaintiffs satisfied the pleading requirement in *Livesay* by asserting in their Complaint that, "[n]one of said cotenants was under any disability during said twenty-one (21) year period." To support the assertions in their Complaint, the plaintiffs introduced the affidavit of Charles Amos, stating that none of the co-tenants were under a disability during the prescriptive period. Moreover, when the plaintiffs filed their motion for summary judgment along with a statement of undisputed facts, the defendants did not initially challenge the plaintiffs' statement of undisputed facts; however, on the morning the motion was set for hearing, the defendants filed an amended response to the plaintiffs' motion for summary judgment in which the defendants placed great emphasis on the fact that at least two of the co-tenants, Annie F. Toran and Christine Taylor, were under the disability of minority for most of the prescriptive period.[9] Significantly, the plaintiffs have not disputed the fact that several of the co-tenants were under the disability of minority during the prescriptive period.[10]

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[9] These facts were already in the record when the amended response was filed. Thereafter, on April 3, 2006, the defendants filed supplemental facts based on the affidavit of Larry Hunter and additional birth certificates of co-tenants under disability as well as death certificates of ancestors from whom they inherited the property.

[10] Because of this development, the original date of the hearing on the motions for summary judgment was continued. After a few weeks, the motions were subsequently reset for hearing, and following the hearing the trial court granted summary judgment to the plaintiffs.

The documentary evidence, which is undisputed, reveals the following facts. Upon the death of Mary Lou Locklayer in1958, one of the original co-tenants was her great niece, Annie Frances Toran.[11] Ms. Toran, who was born in 1945, was only 13 years old at the time she became a co-tenant, and she did not reach the age of majority until 1966.[12] Ms. Toran's younger brother, Larry Thomas Hunter, a great-nephew of Ms. Locklayer, also acquired a co-tenancy interest in 1958 upon the death of Ms. Locklayer. Larry Hunter, who was born May 30, 1953, reached the age of majority, which was eighteen at the time, in 1971. Another great-niece of Ms. Locklayer, Sherrie Lucille Hunter Malone, became a co-tenant in 1958. She was born on July 12, 1956, and reached the age of majority in 1974.[13]

Randall Winstead, Sr., a nephew of Ms. Locklayer, died intestate prior to Ms. Locklayer. Thus, his heirs at law, which included George Winstead, Annie Frances Toran, Larry Thomas Hunter, and Sherrie Lucille Hunter Malone, were co-tenants of the property when Pete Amos first moved onto the property in 1958. George Winstead died intestate in 1969, and was survived by numerous heirs-at-law, six of whom were minors at the time. One of his heirs, James Winstead, was six years old when he became a co-tenant. James Winstead, who was the youngest co-tenant, was under the disability of minority from the day he inherited the property in 1969 until 1981, which was after Pete Amos died.[14]

The foregoing facts, which are undisputed, prove that one or more of the co-tenants were under the disability of minority from 1958 until 1981, which encompasses the entire period of time upon which the plaintiffs assert their claim of title by prescription. Accordingly, it is undisputed that at least one of the co-tenants was under a disability to assert his or her rights during the entire prescriptive period.

The foregoing notwithstanding, the plaintiffs contend the fact that co-tenants were minors during the prescriptive period is not fatal to their claim. It is the plaintiffs' contention that their

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[11] Ms. Toran was one of several heirs at law of Delia Hunter, who was a niece of Ms. Locklayer. Ms. Hunter predeceased Ms. Locklayer, and her interest in the property descended to her heirs at law upon the death of Ms. Locklayer in 1958.

[12] In 1966, the age of majority was twenty-one. The Legal Responsibility Act of 1971 removed the disabilities of minority of all persons 18 to 21 years of age on May 11, 1971, as of May 11, 1971. After that date, all persons reached their majority at age 18. *See* 1971 Tenn. Pub. Acts, ch. 162; *see* Tenn. Code Ann. § 1-3-113 (noting that with a few exceptions, any person who is eighteen (18) years of age or older shall have the same rights, duties, and responsibilities as a person who is twenty-one (21) years of age); *see also Arnold v. Davis*, 503 S.W.2d 100, 102 (Tenn. 1973).

[13] Larry Hunter's affidavit notes that Sherrie Lucille Hunter Malone turned eighteen in 1972; however, her birth certificate states she was born in 1956. Thus, did not reach the age of majority, which was then eighteen, until 1974.

[14] The record further indicates the following dates when George Winstead's heir reached the age of majority: Steven Allen Winstead reached the age of majority in 1971 with the passage of the Legal Responsibility Act of 1971. Maxine Winstead Tolliver, October 25, 1971; Lawrence George Winstead, December 18, 1973; Elvis E. Winstead, February 1, 1977; Cherry Denise Winstead Owsley, December 23, 1979.

disability merely extended the time to contest the prescriptive period by three years. The premise of this contention is based on Tenn. Code Ann. § 28-1-106, which provides:

> If the person entitled to commence an action is, at the time the cause of action accrued, either under the age of eighteen (18) years, or of unsound mind, such person, or such person's representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the removal of such disability.

We, however, find the plaintiffs' reliance on the foregoing statute, as well as the case upon which the plaintiffs principally rely, *Dewey v. Sewanee Fuel & Iron Co.*, 191 F. 450, 453 (M. D. 1910), is misplaced. This is due to the fact the doctrine of title by prescription, unlike the doctrine of adverse possession, is not premised on a limitation of real actions. *See Walker*, 745 S.W.2d at 298; *see also* Tenn. Code Ann. §§ 28-2-101 through 103. Unlike the doctrine of adverse possession, a presumption of title that is based upon the doctrine of prescription "is made without any reference to our Statute of Limitations, and in no analogy to it." *Walker*, 745 S.W.2d at 298.

The court's lengthy analysis in the Supreme Court's opinion of *Scruggs v. Baugh*, 3 Tenn. App. 256 (1926) makes this important distinction clear. In that matter, Eloise Scruggs filed suit against several relatives[15] to, *inter alia,* quiet title to a residence and adjoining property in the City of Franklin, which her father had exclusively possessed for many years. She alleged that in 1897, her grandfather, Silas Baugh, Sr., verbally gave a lot in the City of Franklin to his son, Will H. Baugh (Ms. Scruggs' father), who took immediate possession of the property, erected a house thereon, and remained in the continuous possession and occupancy of the property until his death in 1922. Upon the death of Will Baugh, a widower, Ms. Scruggs inherited the property as his sole heir-at-law. Ms. Scruggs further alleged that since her father's death, she maintained exclusive control and possession of the property.

The relevant portions of the *Scruggs* opinion are:

> [T]he nature of Will H. Baugh's possession was sufficient notice to the other tenants in common that they were excluded from possession. Will H. Baugh was in possession under a parol gift and had remained in the adverse possession for ten years when Silas Baugh Sr. attempted to execute a written instrument showing that he had given that property to Will H. Baugh, and he remained in possession until the death of Silas Baugh, Sr., and continued in the adverse possession until 1922, when he died. It is a different situation from that stated in the case of *Drewery v. Nelms*, where one tenant in common entered upon the land after the death of ancestor.

[15] The defendants were the widow and several children of Silas Baugh, Sr., who had died fifteen years before suit was brought. One of his children was Tom Baugh, who had left home years ago, and none of the family had heard from him in the past fifteen years. His residence was unknown, and it was not known whether he was dead or alive or whether he had heirs. Thus, Tom Baugh and his unknown heirs were named as defendants by publication, and a guardian ad litem was appointed to represent them.

"Ouster and exclusion of co-tenants may be effected by taking possession and affording actual notice of a claim of sole ownership or other positive and unequivocal act that must by its nature put the other co-tenants upon notice that they are excluded from possession. A presumption of title in such cases may also arise upon the same ground that a grant from the State is presumed by exclusive and uninterrupted possession of the land by one tenant in common for twenty or more years, claiming the same as his own, without any recognition of his cotenants or claim upon their part." *See Drewery v. Nelms*, 132 Tenn., 262.

Had this been a case where seven years adverse possession under the statute was raised, then cumulative or successive disabilities would not arrest the running of the statute. In other words, when the statute of limitations once begins to run, it continues even against those under disability. A disability must exist when the right of action accrues, and successive disabilities, whether of the same or different persons are not available. See Shannon's Code, section 4450, Notes 1 to 5; *Patton v. Dixon*, 21 Pick., 97.

But this proposition can have no application to this case, as cumulative or successive disabilities arising during the running of the twenty years adverse possession do arrest the operation of the limitation, the reason being that one acquires title in this manner by prescription, and not under the statute. See McKinney v. Duncan, 121 Tenn. 265; *Ferguson v. Prince*, 136 Tenn., 543; *Davis v. Railroad*, 147 Tenn., 16, and cases cited.

Hence, it is necessary for the complainant to show that her father and she were in the adverse possession for the whole twenty years, in order for her to acquire title by prescription. We think she has done this. The record shows that her father, Will H. Baugh, went into possession in 1897, and held possession until his father died about the year 1910, the record showing that he died about fifteen years ago, then Silas Baugh's heirs were entitled to their interest in the property as Will H. Baugh held under a verbal gift, but they did not repudiate the parol gift and assert their rights, and Will H. Baugh remained in the adverse possession of the property until his death in 1922. *This perfected his title to the property provided none of the tenants in common were infants or married women or under other disabilities at the death of Silas Baugh. If they were under disability, then the adverse possession of Will H. Baugh did not operate against them during such disability*, but it will be presumed in the absence of evidence that persons against whom the prescription is claimed were capable of suing or acquiescing in the prescription, and the fact that they were not sui juris or capable of granting a right must be pleaded and proved. See *Davis v. Railroad*, 147 Tenn., 1, 15 to 17. Hence, we must presume that they were all sui juris.

Scruggs, 3 Tenn. App. 256, at *5-6 (emphasis added).[16]

As *Scruggs* explains, cumulative or successive disabilities of co-tenants that arise during the prescriptive period prevent the period from running in favor of the tenant in possession. *Scruggs*, 3 Tenn. App. 256, at *5-6; *see State ex rel. Comm'r, Dep't of Transp. ex rel. Dep't of Transp. v. Patrick*, No. W2001-00397-COA-R3-CV, 2001 WL 1683751 at *3 (Tenn. Ct. App. Dec. 27, 2001); *see also Walker*, 745 S.W.2d at 298. (holding that "disabilities may accumulate to rebut the presumption, which is unlike the statute of limitations").

We, therefore, find from the undisputed facts of this case that the plaintiff cannot establish that Pete Amos, or any predecessor in interest, maintained exclusive and uninterrupted possession for twenty or more years during which none of the co-tenants were under a disability to assert their rights. Accordingly, the trial court erred by granting the plaintiffs summary judgment.

IN CONCLUSION

The judgment of the trial court granting the plaintiffs' motion for summary judgment is vacated, and this matter is remanded for such other proceedings as may be necessary. The costs of appeal are assessed against the plaintiffs.

FRANK G. CLEMENT, JR., JUDGE

[16] Although the *Scruggs* court made frequent references in the opinion to "years of adverse possession," it is clear the references were not based upon the "doctrine" of adverse possession.